PENGIRAN OTHMAN SHAH BIN PG. MOHD. YUSSOF & ANOR.

v.

KARAMBUNAI RESORTS SDN. BHD.
(FORMERLY KNOWN AS LIPKLAND SABAH SDN. BHD.) & 3 ORS.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J
[CIVIL SUIT NO. K.22-85 OF 1994]
22 OCTOBER 1994

***CIVIL PROCEDURE**: Order 18 r. 19(1)(a), (b) & (d) Rules of the High Court - Striking out the plaintiffs' claim - Laches - Whether plain and obvious case - Whether conflict of material evidence or conflict of affidavits on material points - Whether seemingly triable issues could be readily decided.*

***LAND LAW**: Condition imposed under the Land Regulations of British North Borneo 1894 - Whether deletion and revocation of condition in lease ultra vires - Whether by mutual consent.*

The plaintiffs claimed that they were the beneficial owners by inheritance of land held under a 99 years' lease at Menggatal, Sabah and claimed for rescission of the Memorandum of Intent, Agreements and other documents signed with the first, second and third defendants on the basis that the terms of the document were unconscionable and manifestly disadvantageous to the plaintiffs. The plaintiffs' claim against the fourth defendant, the Director of Lands and Surveys Sabah, was for reinstatement of a condition in the lease which was purportedly deleted or revoked by the fourth defendant by who the plaintiffs contended acted *ultra vires* his powers. The defendants applied to strike out the plaintiffs' claim under O. 18 r. 19(1) (a) (b) and (d), of the Rules of the High Court, 1980 on the ground of laches, limitation and that the deletion of the said condition was by mutual consent.

Held:

[1] The deletion of the condition in the lease was done by mutual consent and was applied for by the plaintiffs themselves. Therefore it was done in accordance with the law.

[2] On the evidence, there is no merit in the allegations in general terms or specifically against the third defendant. The evidence in its totality shows an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided by concluding that the action was bound to fail.

[Defendant's application allowed with costs]

Cases referred to:
Raja Zainal Abidin [1993] 2 SCR 650 SC ***(foll)***
Tractors Malaysia Bhd. [1975] 2 MLJ 1 PC ***(foll)***
Yammamori [1992] 2 MLJ 410 ***(refd)***
Overseas Investment Private Ltd. [1988] 2 CLJ 238 ***(refd)***
Wong Swee Chin [1981] 1 MLJ 212 FC ***(refd)***

Legislation referred to:
Evidence Act 1950 s. 167
Rules of the High Court 1980 O. 18 r. 19 (1)(a), (b) & (d)

Other source referred to:
Supreme Court Practice 1985, vol. 1 pt. 1

For the plaintiffs - Y.A.A. Tun Haji Mohd. Salleh Abas (Dato' Dr. Yaacob Merican & Jonathan Yasin with him).
For the 1st, 2nd & 3rd defendants - Marina Tiu (Jane Manjaji with her)
For the 4th defendant - Juprin Wong-Adamal, Senior State Counsel, (Nor Asiah Mohd. Yusof, State Counsel, State Attorney-General's Chambers with him)

JUDGMENT

Suleiman bin Hashim J:

These are the applications by first, second, third defendants and by fourth defendant under O. 18, r. 19 (1)(a),(b) and (d) Rules of the High Court 1980 to strike out plaintiffs' claim, the respective applications are dated 8 July 1994 and 14 September 1994.

The first defendants were earlier known as the second defendants. The third defendant is the managing director of the first defendants, he was the managing director of the second defendant. The fourth defendant is as described in the suit.

On 8 June 1994 the plaintiffs, twin brothers, had filed their statement of claim against the four defendants that among other things, they "were at all material times the beneficial owner by inheritance of a piece of land held under lease for a term of 99 years (commencing on 23 March 1898) registered as No. 045091174, Menggatal, District of Jesselton (Kota Kinabalu), Sabah, approximately 3853 acres" first, second, third defendants say approximately 3835 acres.

Plaintiffs' claim against first, second, third defendants is that among other things, as succinctly stated in paragraphs 5 to 10 of the statement of claim, perhaps less succinctly reiterated in paragraphs 6(1),(2), 7 and 8 of the plaintiffs' affidavit-in-reply dated 3 September 1994 in these proceedings, in reply to first, second, third defendants' application:

> 5. Some time in 1982 the third defendant was introduced to the plaintiffs by one Pengiran Osman Rauf, a friend of the plaintiffs' father, Pengiran Mohd. Yussof.
>
> 6. Following from that introduction, the plaintiffs and the third defendant became good friends.
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> 7. In or about the month of August 1982, the third defendant requested the plaintiffs to sign a Memorandum of Intent. The plaintiffs signed the Memorandum on the assurance of the third defendant that it was to their benefit to do so. The plaintiffs were not given, and do not have in their possession, a copy of the Memorandum of Intent.
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> 8. Subsequent thereto, the third defendant, acting on behalf of the first defendant, offered to advance on behalf of the plaintiffs the amount payable for or towards estate duty due on the said land, and on 14 October 1982 paid out the sum of RM365,160.71 in settlement of or towards the estate duty so due.
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> 9. From time to time thereafter and until the early part of March 1984, the third defendant advanced various payments to the plaintiffs' father.
>
> 10. Arising from their friendship with, and the financial advances made on their behalf, by the third defendant, the plaintiffs came to repose their trust and confidence in him.

Plaintiffs went on to say, as stated in paragraphs 25 to 30 and 34 to 35 of the statement of claim, again perhaps less succinctly reiterated in paragraphs 6(1),(2), 7 and 8 of plaintiffs' affidavit-in-reply dated 3 September 1994 in these proceedings, in reply to first, second, third defendants' application:

25. The plaintiffs signed the Memorandum of Intent referred to in paragraph 7 when they had yet to attain the age of majority and signed the First Agreement very soon after they attained the age of majority.

26. By reason of their inexperience in matters of business and commerce, the plaintiffs relied on the advice and assurances of the third defendant that the terms of the Memorandum of Intent and of the First Agreement were beneficial to them, and were induced to sign the Memorandum and enter into the Agreement by undue influence of the third defendant and owing to the trust and confidence they reposed in him.

27. Notwithstanding that they had attained the age of majority by then, the plaintiffs continued to rely on the assurances and advice of the third defendant when they signed the subsequent agreements referred to in paragraphs 14, 17, 18, 20 and 23 hereof and the Power of Attorney referred to in paragraph 16 hereof, and by reason of the trust and confidence they reposed in him entered into each of those Agreements by the undue influence of the third defendant.

28. The third defendant further impressed upon the plaintiffs that they ought to sign the aforesaid Agreements and Supplemental Agreement because various sums of money had been advanced to or paid on their behalf by the first defendant (being sums additional to that referred to in paragraph 8 hereof), in respect of the plaintiffs' education and personal expenses. No proper account or statement relating to the said sums was ever furnished to the plaintiffs.

29. The third defendant also impressed upon the plaintiffs that there was no necessity for them to seek or obtain independent legal advice on the aforesaid Agreements and Supplemental Agreements.

30. The transactions effected by the First, Second, Third, Fourth and Fifth Agreements, and by the Supplemental Agreement, were unconscionable and manifestly disadvantageous to the plaintiffs.

XXXX XXXX

XXXX XXXX

34. All the documents referred to in paragraph 33(1), (2) and (7) hereof were executed by the plaintiffs in circumstances similar to those mentioned in paragraphs 27 and 28. It was also impressed upon the plaintiffs by the third defendant that there was no necessity for them to seek or obtain independent legal advice on the aforesaid documents.

35. The terms of the documents aforesaid were unconscionable and manifestly disadvantageous to the plaintiffs.

The Memorandum of Intent and Agreements and other documents referred to by plaintiffs and other relevant documents are, as enumerated under paragraph 5 of the third defendant's affidavit-in-support of application:

1. Memorandum of Intent dated 27 August 1982, third defendant's exhibit "CLK-1".
2. Agreement dated 8 March 1984, the First Agreement, third defendant's exhibit "CLK-2".
3. Agreement dated 18 October 1984, the Second Agreement, third defendant's exhibit "CLK-3".
4. Deed of Revocation dated 30 December 1985, the Third Agreement, third defendant's exhibit "CLK-4".
5. Agreement dated 20 February 1986, the Fourth Agreement, third defendant's exhibit "CLK-5".

6. Agreement dated 19 September 1991, the Fifth Agreement, third defendant's exhibit "CLK-6".

7. Supplemental Agreement dated 11 July 1992, third defendant's exhibit "CLK-7".

8. Power of Attorney dated 18 October 1984, third defendant's exhibit "CLK-8".

9. Memorandum of Sub-Lease which was registered in the Central Land Registry, Kota Kinabalu under Memorial No.10204588 dated 24 November 1984, third defendant's exhibit "CLK-9".

10. Memorandum of Sub-Lease which was registered in the Central Land Registry, Kota Kinabalu under Memorial No.10293276 dated 19 September 1991, third defendant's exhibit "CLK-10".

11. Memorandum of Transfer in respect of 6000/38350 undivided shares on 19 September 1991 now registered in the Central Land Registry, Kota Kinabalu under Memorial No.10293277, third defendant's exhibit "CLK-11".

Plaintiffs claim against first, second, third defendants for rescission of Memorandum of Intent, Agreements and other documents and other reliefs.

First, second, third defendants also seek to strike out plaintiffs' claim on the grounds of laches, also that plaintiffs are now time-barred in respect of the Agreements and other documents.

Plaintiffs' claim against fourth defendant that as stated in paragraph 38 of the statement of claim, reiterated in paragraphs 6, 7 and 8 of the plaintiffs' affidavit-in-reply dated 3 September 1994 in these proceedings, in reply to fourth defendant's application:

38. Clause 20 of Part III of the Deed of the lease set out a condition imposed under the Land Regulations of British North Borneo, 1894. The fourth defendant acted *ultra vires* his powers in purporting to delete or revoke that condition. The purported amendment is invalid.

Plaintiffs claim against the fourth defendant that the said Clause 20 be reinstated, the Memorandam of the two sub-leases registered and the Memorandum of Transfer registered be expunged and other reliefs.

Principles Applicable in an Application Under O. 18, r. 19(1)(a), (b) and (d) Rules of High Court 1980

Puan Marina Tiu and Y.A.A. Tun Haji Mohd. Salleh Abas submitted at length, with references to authorities, Encik Juprin submitted with references to authorities.

Y.A.A. Tun submitted that third defendant's affidavit contains hearsay evidence, which with respect I agree, contains discrepancies. Puan Marina Tiu and Encik Juprin submitted that I am competent and I am not precluded from examining third defendant's affidavit, Puan Marina Tiu invited my attention to *Raja Zainal Abidin* [1993] 2 SCR 650 which agreed with *Tractors Malaysia Bhd.* [1975] 2 MLJ 1 PC. Encik Juprin invited my attention to *Yammamori* [1992] 2 MLJ 410. In *Raja Zainal Abidin (supra)* the Supreme Court, as it then was, said:

> It was unfortunate that the case of *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1, a Privy Council case was not cited in the Court below, though it was cited to us here.
>
> xxxx xxxx
>
> The Privy Council held the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a

fine-tooth comb and decided to agree with the learned Judge at the first instance and restored the High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

xxxx xxxx

The lower Court should have also scrutinized the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to send the case back to its starting point to start its long and expensive course albeit such a conclusion was reached on an application filed under O. 18, r. 19.

All four defendants' applications are under O.18, r.19(1)(b) and (d) as well and with *Raja Zainal Abidin (supra)* read with s. 167 Evidence Act, 1950, I think, I am not precluded from examining third defendant's affidavit.

Puan Marina Tiu citing *Overseas Investment Private Ltd.* [1988] 2 CLJ 238 submitted that "where there is a case to be decided on a contest of affidavits, material evidence which are not contradicted are deemed to be admitted". With respect I do not agree. With respect I have for my guidance the judgment of Raja Azlan Shah, CJ Malaya as he then was, in *Wong Swee Chin* [1981] 1 MLJ 212 FC:

On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witnesses' testimony. But as is common with all general rules there are also exceptions...

Puan Marina Tiu and Y.A.A. Tun submitted at length with references to authorities, with Puan Marina Tiu's references to authorities "whether a case is plain or simple does not depend upon the length of time it takes to argue", "Court may scrutinize the evidence in order to decide whether action is bound to fail", "Court has a discretion not to strike out the affidavit", with Y.A.A. Tun's references to authorities on "application", "Exercise of powers under this rule", "No reasonable cause of action or defence - principles applicable", "Frivolous or vexatious", Abuse of the process of the Court", with reference to the **Supreme Court Practice 1985**, Vol. I, Part I, O. 18, r. 19, with Puan Marina Tiu at one stage complaining that Y.A.A. Tun seems to have a penchant for old cases, old authorities.

With respect I think I am not wrong that in the final analysis as submitted by Y.A.A. Tun:

Exercise of powers under this rule - it is only in plain and obvious cases that recourse should be had to the summary process under this rule.

Deed of the Lease Between the British North Borneo Company and Pangeran Siti Fatimah Binte Pangeran Jalaludin Dated 16 July 1941 (Third Defendant's Exhibit CLK-12) Under Which Plaintiffs Now Derive Their Beneficial Interest, Express Condition Paragraph 6 Thereto, Clause 20 of "Part iii General Provisions as to All Lands", the Deletion by Fourth Defendant of the said Clause 20.

The Clause 20 is:

20. All dealings in land between European and Chinese and other foreigners on the one hand, and the natives of the country on the other hand are hereby expressly forbidden, and no such dealings shall be valid or shall be recognized in any Court of law unless such dealings shall have been entered into and concluded before 16 January 1883.

As regards the deletion of Clause 20 Y.A.A. Tun submitted what is stated in paragraph 14 and in paragraph 8 of plaintiffs' affidavits-in-reply, both dated 3 September 1994 in these proceedings, in reply to the applications by first, second, third defendants and fourth defendant respectively, the language in the two paragraphs being identical:

> I am advised and verily believe that the statement of claim has raised arguable, difficult and important points not only of fact but also of law, including constitutional law concerning the Treaties signed by the British North Borneo Company, and the history, which led to the aforesaid Clause 20 being embodied in the Title Deed.

Puan Marina Tiu for first, second, third defendants submitted the Title Deed is as in third defendant's exhibit "CLK-12" with the express condition in paragraph 6 thereto being what it says, not a prohibition absolute. With respect I agree with Puan Marina Tiu. Clause 6 says what it means and means what it says, it is not ambiguous, it is plain and obvious. It says:

> 6. The land held here under shall not be transferred to an alien except with the consent of the Company.

It means that the land can be transferred to an alien with the consent of the Company.

And with respect as regards the deletion of the Clause 20 by way of a complete answer, not that to be otiose, but may be at the risk of being verbose may I quote paragraphs 5 and 6 of the affidavit-in-support of the application by fourth defendant, the affidavit of Encik Kuleong C. Mopilin, the Director of Lands and Surveys Sabah, fourth defendant dated 14 September 1994:

> 5. I deny the allegation contained in paragraph 38 of the statement of claim which stated that I have acted *ultra vires* my powers in purporting to delete or revoke the condition set out under Clause 20 of Part III of the Annexure to the Deed of Lease. As it was the plaintiffs who applied to have Clause 20 of Part III of the Annexure to the Deed of Lease comprised in C.L. No.045091174 deleted, the resulting deletion applied for was, therefore, effected by mutual consent. A copy of the plaintiffs' application for deletion of the said Clause 20 is now produced and shown to me marked "KCM-1".
>
> 6. The plaintiffs' application was approved *vide* an Offer of Amendment issued to the plaintiffs and that the Offer of Amendment was accepted and signed by the plaintiffs and by the Assistant Public Trustee Sabah as the administrator of half undivided share of the land held under the Deed of Lease. A photocopy of the said Offer of Amendment is produced and shown to me marked "KCM-2" .

I attach the exhibits "KCM-1" and "KCM-2":

> (1) "KCM-1" comprising plaintiffs' letter to the then Chief Minister, Sabah, dated 10 September 1984, plaintiffs' letter to the Public Trustee dated 16 November 1984, Public Trustees' two letters to Setiausaha Hasil Bumi, Jabatan Ketua Menteri, Sabah, dated 17 November 1984 and 23 November 1984.
>
> (2) "KCM-2" comprising the offer of Amendment dated 26 November 1984, Memorandum of Amendment dated 30 November 1984, letter of confirmation of the deletion of the Clause 20 by Setiausaha Hasil Bumi, Jabatan Ketua Menteri, Sabah, dated 29 November 1984.

And as stated in paragraphs 7 to 10 of the affidavit of Encik Kuleong C. Mopilin dated 14 September 1994:

7. I am advised by my advocate that it follows from the foregoing paragraphs that the plaintiffs are precluded and estopped from raising objection to the legality of the deletion of Clause 20 of Part III of the Annexure to the Deed of Lease as such deletion was made through mutual consent and, further, they were parties to the act complained of.

8. Further and in the alternative, I am advised by my advocate that assuming that the act of deleting or revoking Clause 20 of the Part III of the Annexure to the Deed of Lease complained of by the plaintiffs is illegal, which is denied, then the plaintiffs being parties thereto and having applied for and consented to such deletion or revocation cannot claim any remedy under such illegal act.

9. Therefore, based on the above paragraphs the action discloses no reasonable cause of action against the fourth defendant or is scandalous, frivolous or vexatious or an abuse of the process of the Court.

10. In the premises, I respectfully pray for an Order that the said writ of summons together with the statement of claim be set aside and struck out with costs.

Perhaps poignant as pointed out by Encik Juprin Wong-Adamal, Senior State Counsel, State Attorney-General Chambers, Kota Kinabalu, Sabah, the Memorandum of Amendment dated 30 November 1984, part of "KCM-2" with the entry "the deletion of the whole of Clause 20 under Part III - General Provision to All Lands, i.e, All dealings in land.... 1883" was attested by Encik Ansari Abdullah Ali, Advocate/Solicitor, who subsequently in these proceedings drafted paragraph 7 of plaintiffs' affidavit-in-reply dated 3 September 1984 as follows:

> As to paragraph 8 of the affidavit, the fourth defendant in purporting to delete the said provisions acted *ultra vires* his authority and powers; and the purported deletion was void *ab initio*.

Encik Ansari cannot on 30 November 1984 attest the deletion of the Clause 20 and on 3 September 1994 draft in plaintiffs' affidavit-in-reply that the deletion of the Clause 20 is "..... void *ab initio*", Encik Ansari cannot on 30 November 1984 approbate and on 3 September 1994 reprobate. There is an old case, just over 30 years old now, the case of *Mohd. bin Jamal v. P.P.* [1964] 30 MLJ 254 FC, the case of the "ignorance" of Counsel. I do not think this is a case of ignorance of Encik Ansari. Encik Ansari's affidavit-in-reply dated 6 October 1994 is silent on this matter.

Further Encik Juprin Wong-Adamal, Senior State Counsel, State Attorney-General's Chambers, Kota Kinabalu, Sabah, fourth defendant's supplementary affidavit-in-support dated 11 October 1994 explained the legal position today which may be superfluous for me to repeat, which is:

4. As Proclamation No.III of 1984 under which the Land Regulations of 1894 was enacted has been repealed by Proclamation No.XXIII of 1903 which came into force on 1st day of April 1904, it follows that the Land Regulations of 1984 which contained the impugned Clause 20 ceased to have statutory force as of that date. A copy of the Proclamation No.XXIII of 1903 is now produced and shown to me marked "JWA-1".

5. Therefore, the inclusion of the Land Regulations 1894 as an annexure to the Deed of Lease which was issued on 16 July 1941 was meant to be merely conditions, as opposed to laws, to the Deed of Lease which may be amended, modified or deleted by the mutual consent of the lessor and the lessee. As such, the question of acting *ultra vires* the State Constitution, therefore, does not arise.

Allegations by Plaintiffs Against Third Defendant

It is not in dispute that sometime in 1982 third defendant was introduced to plaintiffs by Datuk Pengiran Othman Awang, the then Minister of Federal Territories, a friend of plaintiffs' father Pengiran Mohd. Yusoff.

Plaintiffs' allegations against third defendant following the chronological order, paragraphs 6, 7, 9, 10, 26, 27, 28, 29 and 34, 30 and 35 in plaintiffs' statement of claim repeated although only briefly in paragraph 6(1) and (2) of plaintiffs' affidavit-in-reply dated 3 September 1994 are, in the paragraphs:

(1) 6 Plaintiffs and third defendant became good friends.

(2) 7 Plaintiffs signed Memorandum of Intent on the assurance of third defendant that it was to their benefit to do so.

(3) 9 Third defendant advanced various payments to plaintiffs father.

(4) 10 Plaintiffs came to repose their trust and confidence in third defendant.

(5) 26 Plaintiffs by reason of their inexperience in matters of business and commerce relied on the advice and assurances of third defendant, undue influence of third defendant, trust and confidence they reposed in him.

(6) 27 Notwithstanding they had attained the age of majority they continued to rely on the assurances and advice of third defendant, undue influence of third defendant.

(7) 28 Undue influence of third defendant because various sums of money had been advanced to or paid on their behalf.

(8) 29/ Third defendants impressed upon 34 plaintiffs there was no necessity for 34 them to seek or obtain legal advice on the aforesaid documents.

(9) 30/ First, Second, Third, Fourth, Fifth Agreements, Supplementary Agreement, 35 were unconscionable and manifestly disadvantageous to plaintiffs.

The allegations, each and every one of them, are of course a question of fact. Puan Marina Tiu tendered authorities on "undue influence", manifestly disadvantageous", "capacity to influence", "unfair advantage taken", "victimisation", "manifest and unfair disadvantage", "the doctrine of undue influence has been sufficiently developed not to need the support of a principle of `inequality of bargaining power'", "transaction unconscionable", "breach of a fiduciary relationship", "where businessmen are negotiating at arm's length", " a question of fact and degree".

As Regards Advances to Plaintiffs' Father

Third defendant says these were at the request of plaintiffs' father, to be set off under the terms of payments under the Agreements, exhibits "CLK-35(a)" and "CLK-35(b)", total RM65,000.

As Regards the Allegations of Advances by Third Defendant, of Undue Influence by Third Defendant, of Advances Linked with Undue Influence.

Third defendant says the advances were not advances *ipse dixit* as stated by plaintiffs, that plaintiffs attained the age of majority on 7 February 1984, plaintiffs' father died on 28 August 1984 and:

(1) "Without the plaintiffs' father's control, plaintiffs' life-style became even more extravagant. They had no hestitation whatsoever in spending approximately RM200,000 within a period of about four (4) months or incurring substantial bills in five-star hotels" exhibits "CLK-33(a)" TO "CLK-33(m)" from 30 September 1989 to 5 October 1991 total RM205,554.90.

(2) "In order to pay for that life-style aforesaid, plaintiffs borrowed from anyone they could in addition to incessantly demanding advances from plaintiffs (sic). It is now produced and shown to me some of the requests for payments made by plaintiffs' creditors ... ", exhibits "CLK-34(a)" to "CLK-34(f)" from 5 November 1991 to 18 July 1992 total RM777,611.15.

(3) "Because of their life-style aforesaid plaintiffs' demand for advances became more insistent and at times violent. Whereas initially the request for advances both made orally and in writing were courteous the subsequent demands" were arrogant and threatening particularly after the death of plaintiffs' father exhibits "CLK-35(a)" to "CLK-35(p)" including hire purchase of two vehicles, from 26 April 1983 to 9 November 1988 total RM559,792.80.

As Regards Allegation of "There Was no Necessity For Them to Seek or Obtain Independent Legal Advice on The Aforesaid Documents, Agreements Were Unconscionable and Manifestly Disadvantageous to Plaintiffs"

To begin with the Memorandum of Intent, exhibit "CLK-1" dated 27 August 1982, when plaintiffs were still minors. The preamble reads, *inter-alia,* that plaintiffs' father and Pengiran Othman Rauf @ Awang as the "legal representatives" of plaintiffs. As admitted by plaintiffs Datuk Pengiran Othman Rauf, the then Minister of Federal Territories, was a friend of plaintiffs' father and I do not think the two of them, even if the term "legal representatives" is a misnomer, would do anything especially of the magnitude of the land in question to the detriment of plaintiffs.

The subsequent Agreements, First Agreement dated 8 March 1984 exhibit "CLK-2" was attested by Encik Yusof Ahmad, Advocate/Solicitor; Second Agreement dated 18 October 1984 exhibit "CLK-3" was attested by Encik Ansari Abdullah Ali, Advocate/Solicitor; Deed of Revocation dated 30 December 1985 exhibit "CLK-4" was attested by Encik Ansari Abdullah Ali, Advocate/Solicitor; Fourth Agreement dated 20 February 1986 exhibit "CLK-5" was attested by Encik Ansari Abdullah Ali, Advocate/Solicior; Fifth Agreement dated 19 September 1991 exhibit "CLK-6" was attested by Mr. Lee Choon Wan Advocate/Solicitor; Supplemental Agreement dated 11 July 1992 exhibit "CLK-7" was attested by Mr. Lee Choon Wan, Advocate/Solicitor; Power of Attorney dated 18 October 1984 exhibit "CLK-8" was attested by Encik Ansari Abdullah Ali, Advocate/Solicitor; Memorandum of Sub-Lease registered on 24 November 1984 Memorial No.10204588 exhibit "CLK-9" was attested by Encik Saman Gulam, Advocate/Solicitor; Memorandum of Sub-Lease registered on 19 September 1991 Memorial No.10293276 exhibit "CLK-10" was attested by whom is not clear from the photostat copy; Memorandum of Transfer registered on 19 September 1991 Memorial No.10293277 exhibit "CLK-11" was attested by whom is not clear from the photostat copy.

On 29 May 1986 Encik Ansari had billed plaintiffs for professional fees, exhibit "CLK-16" in respect of:

> For taking your instructions on the above matter including preparing, attesting and stamping of four (4) copies of the abovementioned Agreement executed between yourselves and M/s LIPKLAND (S) SDN BHD and a POWER OF ATTORNEY for the same executed by your-

selves; giving opinion on the Agreement dated March 8, 1984 executed between yourselves and M/S LIPKLAND (S) SDN BHD; preparing a JOINT-VENTURE AGREEMENT between yourselves and the DEVELOPER; preparing and lodging two (2) sets of MEMO OF SUB-LEASE FOR CL 9117 and CL 623; attending numerous meetings and discussions between yourselves and the DEVELOPER including those attended by the former Chief Minister and the State Secretary; went to Kuala Lumpur for the signing of the Agreement; writing letters to the Developer and the Government Departments concerned together with our general care, attendance and consideration.

The documents specifically referred to in the bill are exhibits "CLK-2", "CLK-9" and "CLK-10".

Encik Ansari said in paragraph 25 of his affidavit-in-reply dated 6 October 1994 that after May 1986 he was no more the solicitors for plaintiffs but on 15 January 1987 plaintiffs billed second defendants and were paid for Encik Ansari's air-fare and hotel expenses in Kuala Lumpur from 8 January 1987 to 12 January 1987, exhibit "CLK-66(a),(b)".

Plaintiffs have had the advice of Encik Yusof Ahmad, Encik Ansari Abdullah Ali and Encik Saman Gulam with Encik Ansari as plaintiffs' long time and current Solicitors and legal adviser and I do not think plaintiffs can now complain *a fortiori* with the advice of Encik Ansari that plaintiffs were denied "independent legal advice" or that the Agreements were "unconscionable and manifestly disadvantageous to plaintiffs". In fact and in truth the impugned transactions are manifestly advantageous to plaintiffs. Under the Fifth Agreement, exhibit "CLK-6" plaintiffs have been paid RM4,800,000 the payment being made by virtue of the Supplemental Agreement, exhibit "CLK-7". Benefits to accrue to plaintiffs and plaintiffs' descendants are:

1. An annual income of RM75,000 for 99 years with increment tied to the progressive development of the leased land and a further increment of 10% every 10 years;
2. At the end of 99 years, on reversion to the plaintiffs or their descendants, the leased land would have been tremendously enhanced by the development carried out by the first defendant and the buildings and amenities erected thereon;
3. Advances for effecting settlement of the estate duty due on the land and for their education requirements;
4. The payment of all quit rent, rates and other outgoing on the Karambunai Land; and
5. Upon registration of the lease a deposit or advance of RM1,000,000 less any advances previously paid.

Plaintiffs have to date been paid RM10,856,714.79, exhibit "CLK-51".

Paragraph 8 of Plaintiffs' Affidavit-in-Reply Dated 3 September 1994

It is:

8. As for the action being barred by limitation, it is the case for the plaintiffs that we were not given copies of any of the agreements and documents we had executed and were not aware of the purport and implications of the agreements until after we were served with the action registered as Originating Summons No.K. 24-124-1993, instituted in the High Court of Borneo at Kota Kinabalu, in October, 1993.

"**Not given copies of any** of the agreements and documents...". The emphasis is mine.

"**Not aware** of the purport and implications of the agreements... until after...". The emphasis is mine.

With utmost respect it is odd that Encik Ansari as Solicitors for and legal adviser to plaintiffs can now get plaintiffs to say so when, in chronological order:

(1) on 7 March 1986 Encik Ansari as Solicitors for and legal adviser to plaintiffs by letter of the same date, exhibit "CLK-49" forwarded to second defendant "duly executed by our clients":

(a) Four (4) copies of Lease Agreement;

(b) Four (4) copies of Power of Attorney;

(c) Four (4) copies of Deed of Revocation; and

(d) Four (4) copies of Deed of Revocation of Power of Attorney.

(2) On 29 May 1986 Encik Ansari as Solicitors for and legal adviser to plaintiffs had billed plaintiffs for professional fees which included for exhibits "CLK-2" "CLK-9" and "CLK-10" (please see paragraphs 34 and 35 hereinabove).

Conclusion:

The deletion of Clause 20, the deletion to the restriction upon the land is in accordance with the law. On the evidence as a whole, in its totality I find that there is no merit in any of the allegations, in general terms or specifically as against third defendants and also I have for my guidance, in *Raja Zainal Abidin (supra).*

> We must emphasize that for any Court to reach such similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

With utmost respect in the present applications before me on the evidence as a whole, in its totality there "have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail."

I allow first, second, third defendants' application with costs. I allow fourth defendant's application with costs.

Plaintiffs' suit is struck out and is dismissed with costs.

(Ekhibit KCM-1)

AK Ahmad Shah and
AK Othman Shah,
c/o 32nd Floor,
Menara Tun Razak,
Jalan Raja Laut,
Kuala Lumpur.

10 September 1984

Yang Amat Berhormat,
Datuk Harris Mohd Salleh,
Pejabat Ketua Menteri,
Kota Kinabalu,
Sabah.

Yang Amat Berhormat Datuk,

Re: Land held under L9117
District of Kota Kinabalu, Menggatal

We are the registered and beneficial owners of an undivided quarter share each in the abovementioned property (the said land). A copy of the document of title of the said land is enclosed herewith for your perusal.

We humbly wish to appeal to Yang Amat Berhormat Datuk for a direction to the Honorable Director of Lands and Survey, Kota Kinabalu to delete Clause 20 of the Land Regulations of British North Borneo 1894 from the document of title to the said land on the following grounds:

1. We have recently been able to interest Lipkland (Sabah) Sdn. Bhd. (LSSB) to take a sub-lease of our joint share holdings in the said land for 99 years. LSSB proposed to develop the sub-leased land into a tourist resort and a housing, commercial and industrial estate (the project) on a joint venture basis with us. However, the said land is, *inter alia*, subject to a restrictive clause prohibiting all dealings in respect to the said land between natives and non-natives. It is feared that Clause 20 may affect the marketability of the sub-lease in question and therefore, make it no longer viable to develop the project.

2. We believe the project will benefit us greatly and will yield us income much needed for our maintenance and education as we are students currently studying in West Malaysia.

3. We also believe that this project would benefit people of Sabah as a whole as the successful development of the project would bring in revenue, generate income and foreign exchange, and directly encourage other industries and investments to follow.

In the light of the above, we shall be most grateful if our application would meet with a favourable reply from Yang Amat Berhormat Datuk.

Yours faithfully,

signed
.....
AK Ahmad Shah

signed
.....
AK Othman Shah

(Ekhibit KCM-1)

AK Ahmad Shah Bin Pg. Mohd Yusof
Jalan Waran
Kg Karabunan
Kota Kinabalu

16 November 1984

The Public Trustee
2nd Floor, Bank Negara Bldg
Sabah

Dear Sir

Re: Land Held under lease No. 9117 in Menggatal in the district of Jesselton (Kota Kinabalu)

As you are the trustee of the other undivided half (1/2) share in the abovementioned land (the said land) we would like to seek your consent for the deletion of Clause 20 of the Land Regulations 1894 from the document of title to the said land and for the said land to be partitioned and for separate documents of title to be issued in respect thereof.

As you know, the said land is subject to the provision of the Land Regulations of 1894 which amongst other things prohibits all dealings between natives and non-natives under Clause 20 of the aforesaid Land Regulations. Consequently the value of the said land is very much depressed and any proposed development of same is rendered uneconomic and non-viable.

We have recently entered into an Agreement to sub-lease our undivided half (1/2) share to Lipkland (Sabah) Sdn. Bhd. for the purpose of tourism, commercial housing and industrial development. Such development would further enchance the value of the said land as a whole.

The Jabatan Hasil Bumi has approved the development of the said land as envisaged by Lipkland (Sabah) Sdn. Bhd.

We have been advised by our lawyers that Clause 20 can be deleted. The Honorable-Attorney General has also consented to the deletion.

As the registered owners of the other undivided half (1/2) share of the said land, we would appeal to you to extend your help and cooperation to us and agree to our requests as the deletion of such a clause would not only benefit us but also all parties who have any title or interests in the said land whatsoever.

We would appreciate your immediate reply. Thank you.

Yours faithfully

signed
.....

AK Ahmad Shah Bin Pg. Mohd Yusof

(Ekhibit KCM-1)

Jabatan Pemegang Amanah Rakyat
dan Pentadbir Negara,
Peti Surat No. 127,
Kota Kinabalu, Sabah

Ruj. Tuan:
Ruj. Kami: Pn. P.P. (SB) 190/80/97
Tarikh: 17hb November, 1984

Setiausaha Hasil Bumi
Jabatan Ketua Menteri
Kota Kinabalu

U.P. Encik William Shim

Tuan

Re: Land Held Under Lease No.9117, Menggatal
Estate of Pengiran Siti Halimah and
Estate of Pg. Siti Hapsah bte Pg. Mohd Salleh (deceased)

I refer to the application of the two beneficiaries in the Estate of Pengiran Siti Halimah namely AK Ahmad Shah and AK Othman Shah for the deletion of Clause 20 of the Land Regulations 1894 from the document of title to Lease No. 9117 (Menggatal). A photostat copy of the said application is enclosed herewith for your perusal.

2. In view of the economic reasons stated in the said application which is in my opinion beneficial of the beneficiaries of the two estates, I have no objection to such deletion of the clause mentioned at paragraph 1 *supra*.

Saya yang menurut perentah,

signed
.....

(Wilfred E. Leong)
Penolong Pemegang Amanah Raya, Sabah

s.k. Peguam Besar Negeri,
Jabatan Peguam Besar Negeri,
Bangunan Yayasan Sabah,
Kota Kinabalu

Pengarah,
Jabatan Tanah dan Ukur,
Kota Kinabalu

WEL/jc

(Ekhibit KCM-1)

Jabatan Pemegang Amanah Rakyat
dan Pentadbir Negara,
Peti Surat No. 127,
Kota Kinabalu, Sabah

Ruj. Tuan:
Ruj. Kami: Pn. PP (SB) 190/80/98
Tarikh: 23rd November, 1984

Setiausaha Hasil Bumi,
Jabatan Ketua Menteri,
Kota Kinabalu

U.P. Encik William Shim

Re: Land held under Lease No. 9117, Menggatal
Estate of Pengiran Siti Halimah (deceased) and
Estate of Pg. Siti Hapsah bte Pg. Mohd. Salleh (deceased)

In amplification to my letter of 17th November, 1984, please be informed that the Public Trustee Malaysia is the administrator of the two estates namely Pg. Siti Halimah (deceased) and Pg. Siti Hapsah bte Pg. Mohd. Salleh (deceased).

2. The two said deceased *supra* jointly owned the said land. The estate of Pg. Siti Halimah (deceased) is now wound up and the deceased's half undivided share in the said land has been transferred to the two beneficiaries referred to in my letter dated 17th November, 1984.

3. In respect of the Estate of Pg. Siti Hapsah, as administrator of the said estate and as co-owner of the C.L.9117 (Menggatal), I have no objection to the deletion of the Clause 20 of the Land Regulations 1894 from the document of title.

Saya yang menurut perentah,

signed

.....

(Wilfred E. Leong)
Penolong Pemegang Amanah Raya, Sabah

s.k. Peguam Besar Negeri,
Jabatan Peguam Besar Negeri,
Bangunan Yayasan Sabah,
Kota Kinabalu

Pengarah,
Jabatan Tanah dan Ukur,
Kota Kinabalu

WEL/jc

(Ekhibit KCM-1) TKG/aa

Jabatan Tanah dan Ukur
Kota Kinabalu
Date: 26 November 1984

Pengiran Siti Hapsah,
Encik A.K. Ahmad Shah dan
Encik A.K. Othman Shah,
c/o 32nd Floor, Menara Tun Razak,
Jalan Raja Laut,
Kuala Lumpur.

Tuan/Puan,

Offer of Amendment to
Title No. 045091174
Locality: Menggatal

1. I hereby offer to amend the title in accordance with the attached draft Memorandum of Amendment reference L.S. 122.1.132/95 dated 26 November 1984
2. This offer is open and valid only until and shall lapse on day 31 of month January of year 1985
3. Please return the original copy of LSF 1053, the issue copy of the title and a copy of this offer to Pengarah Tanah dan Ukur signifiying your acceptance by signing in the place provided.
4. After acceptance, failure to meet or observe any of the terms and conditions of this offer or in any case failure to complete all payments due, shall render this offer invalid and void.

Saya yang menurut perintah,

signed

.....
(Chua Kok Hwa)
b.p. Pengarah Tanah dan Ukur.

s.k.

I/We hereby accept the terms and conditions of the above stated offer.

Name Block Letters	signature
PENGIRAN SITI HAPSAH	signed
ASSISTANT PUBLIC TRUSTEEE SABAH	signed
A.K. AHMAD SHAH B. PG. MOHD YUSOF	signed
A.K. OTHMAN SHAH B. PG. MOHD YUSOF	signed

Witness qualified under Sec. 97 of Cap 68

signed

ANSARI ABDULLAH ALI
Advocate & Solicitor
Kota Kinabalu

a TKG/aa

State of Sabah, Malaysia
Land Ordinance, Cap 68 (Section 88)
Date: 26 November 1984 **Memorandum of Amendment**

b In consideration of the payment to the Government of the State of Sabah of the premium of ringgit ... Nil ... xxx ... the Director of Lands and Surveys hereby amends the title numbered 045091174 and registered in the Central Land Office, Kota Kinabalu ... by xxx ... xxx .... xxx .... xxx .... xxx ... the deletion of the whole of clause 20 under Part III - General Provision to All Lands i.e ... xxx "All dealings inland ... 1883"

* the addition of the following Special Terms:

c In Witness Whereof We, the said Director and **Pengiran Siti Hapsah, AK Ahmad Shah b. Pg. Mohd Yusof and AK Othman Shah b. Mohd Yusof** being the registered owners/of the said title have hereunto set our hands this **30th day of November 1984.**

Registered Owners	1. AK Othman Shah b. Pg. Mohd Yusof	signed
	2. Pengiran Siti Hapsah	signed
	3. AK Ahmad Shah b. Pg. Mohd Yusof	signed

d

Witness qualified under section 97 attesting the signature of the owners/s — signed
Ansari Abdullah Ali
Advocate & Solicitor
Kota Kinabalu

Designation of witness

e

Director

Witness qualified under section 97 attesting the signature of the Director — signed
Patrick Kenny Sebangkit
Land Office Supervisor (HQ)
Kota Kinabalu

Designation of witness

f

Registered

Acepted by signed
Collector

Memorial No. 10204942 (06)
Time: 1240 hrs
Date: 3 Disember 1984
Nature: The deletion of the whole
g of clause 20 under part III General Provision to all lands i.e. "All dealings inland.....16th day of January 1883"

By: Director

h

signed
.....
Registrar

i

* Delete where not applicable

I certify all dues on the said Title have been paid

Viz:	$ cts	Receipt No.	Date
Premium			
Registration fee	50		
Attestation	---		
	50	11813261	1/12/84
	---		

and up to and including the current year: 1984
Rent
Others

signed
.....
Assistant Collector of Land Revenue

(Ekhibit KCM-2)

Jabatan Ketua Menteri
Kota Kinabalu
Sabah, Malaysia
29 November 1984

26 November 1984
Pengarah Tanah dan Ukur,
Kota Kinabalu.

Tuan,

Permohonan Pendaftaran Sewa Tanah
C.L. 9117 dan C.L. 623

Berlanjutan dengan surat pejabat ini bilangan MNRC.204/13 Vol.II/62 bertarikh 24 November 1984, sila maklum bahawa atas permintaan tuan-tuan-punya tanah, syarat perenggan (20) dalam Lease 9117 dipersetujui dihapuskan.

Sekian, harap maklum.

"Berkhidmat Untuk Negara Dengan Bersih, Cekap dan Amanah"

Saya yang menurut perintah,

signed

.....
(William Shim)
Setiausaha Hasil Bumi